

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIVIANA M. RAMIREZ,

Plaintiff,

v.

OFFICER GEORGE SPRINGER,
OFFICER SPRANKLE,

Defendants.

No. C 09-0600 JSW (PR)

**ORDER OF SERVICE;
DIRECTING DEFENDANT TO FILE
DISPOSITIVE MOTION OR
NOTICE THAT SUCH MOTION IS
NOT WARRANTED**

INTRODUCTION

Plaintiff, a prisoner of the State of California currently incarcerated at Valley State Prison for Women, filed this pro se civil rights complaint under 42 U.S.C § 1983 alleging that Defendant San Jose Police Officers used excessive force against her during the course of her arrest and subsequently illegally searched her residence. Plaintiff's motion to proceed *in forma pauperis* was previously granted in the United States District Court for the Eastern District of California, before this matter was transferred to this Court. This Court now reviews the Complaint pursuant to 28 U.S.C. § 1915A and serves Plaintiff's claims as set forth below.

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must identify cognizable claims or dismiss the

1 complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or
 2 fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a
 3 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
 4 liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
 5 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:
 7 (1) that a right secured by the Constitution or laws of the United States was violated, and
 8 (2) that the alleged violation was committed by a person acting under the color of state
 9 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

10 Having reviewed the complaint, the Court finds Plaintiff’s allegations, when
 11 liberally construed, state a cognizable claim that Defendants Springer and Sprankle
 12 violated her constitutional rights by using excessive force against her during arrest,
 13 *Pierce v. Multnomah County, Oregon*, 76 F.3d 1032, 1043 (9th Cir. 1996) (Fourth
 14 Amendment protects arrestees from use of excessive force until release or arraignment),
 15 and for illegally searching her residence, *Payton v. New York*, 445 U.S. 573, 586 (1980).
 16 Accordingly, these claims will be served.

17 CONCLUSION

18 For the foregoing reasons, the Court orders as follows:

19 1. The Clerk of the Court shall issue summons and the United States Marshal
 20 shall Clerk of the Court shall issue summons and the United States Marshal shall serve,
 21 without prepayment of fees, a copy of the Complaint and all attachments thereto, and a
 22 copy of this order upon: **San Jose Police Officer George Springer (Badge Number**
 23 **1937) and Officer Sprankle (Badge Number 3130) at the San Jose Police**
 24 **Department.** The Clerk shall also mail a courtesy copy of the Complaint, all
 25 attachments thereto, and this order to the San Jose City Attorney’s Office and serve a
 26 copy of this order on Plaintiff.
 27
 28

2. No later than **sixty (60) days** from the date of this order, Defendants shall either file a motion for summary judgment or other dispositive motion, or a notice to the Court that he/she is of the opinion that this matter cannot be resolved by dispositive motion. The motion shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56.

a. If Defendant elects to file a motion to dismiss on the grounds that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendant **shall** do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56. **Defendant is advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If Defendant is of the opinion that this case cannot be resolved by summary judgment, she/he shall so inform the Court prior to the date the summary judgment motion is due.**

All papers filed with the Court shall be promptly served on the Plaintiff.

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendant no later than **thirty (30) days** from the date Defendant's motion is filed.

a. In the event the Defendant files an unenumerated motion to dismiss under Rule 12(b), Plaintiff is hereby cautioned pursuant to *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 & n.4 (9th Cir. 2003):

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why

1 they are authentic, or other sworn papers, such as answers to
 2 interrogatories or depositions.

3 If defendants file a motion to dismiss and it is granted, your case
 4 will be dismissed and there will be no trial.

5 b. In the event Defendant files a motion for summary judgment, the Ninth
 6 Circuit has held that the following notice should be given to pro se Plaintiffs:

7 The defendants have made a motion for summary judgment by
 8 which they seek to have your case dismissed. A motion for summary
 9 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
 10 granted, end your case.

11 Rule 56 tells you what you must do in order to oppose a motion for
 12 summary judgment. Generally, summary judgment must be granted when
 13 there is no genuine issue of material fact--that is, if there is no real dispute
 14 about any fact that would affect the result of your case, the party who
 15 asked for summary judgment is entitled to judgment as a matter of law,
 16 which will end your case. When a party you are suing makes a motion for
 17 summary judgment that is properly supported by declarations (or other
 18 sworn testimony), you cannot simply rely on what your complaint says.
 19 Instead, you must set out specific facts in declarations, depositions,
 20 answers to interrogatories, or authenticated documents, as provided in Rule
 21 56(e), that contradict the facts shown in the defendants' declarations and
 22 documents and show that there is a genuine issue of material fact for trial.
 23 If you do not submit your own evidence in opposition, summary judgment,
 24 if appropriate, may be entered against you. If summary judgment is
 25 granted in favor of defendants, your case will be dismissed and there will
 26 be no trial.

27 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 28 read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477
 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
 evidence showing triable issues of material fact on every essential element of his claim).
 Plaintiff is cautioned that failure to file an opposition to Defendant's motion for summary
 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
 granting of judgment against Plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,
 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

4. Defendant *shall* file a reply brief no later than **fifteen (15) days** after Plaintiff's
 opposition is filed.

5. The motion shall be deemed submitted as of the date the reply brief is due. No

1 hearing will be held on the motion unless the Court so orders at a later date.

2 6. All communications by the Plaintiff with the Court must be served on
3 Defendant, or Defendant's counsel once counsel has been designated, by mailing a true
4 copy of the document to Defendants or Defendant's counsel.


5 7. Discovery may be taken in accordance with the Federal Rules of Civil
6 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
7 Local Rule 16-1 is required before the parties may conduct discovery.

8 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
9 Court informed of any change of address and must comply with the court's orders in a
10 timely fashion. Failure to do so may result in the dismissal of this action for failure to
11 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

12 This order terminates Docket No. 2.

13 IT IS SO ORDERED.

14 DATED: May 26, 2009

15 
16 _____
JEFFREY S. WHITE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

VIVIANA M. RAMIREZ et al,
Plaintiff,

Case Number: CV09-00600 JSW

CERTIFICATE OF SERVICE

v.


GEORGE SPRINGER et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 26, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Viviana M Ramirez X25428
VALLEY STATE PRISON FOR WOMEN (96)
P.O. BOX 96
CHOWCHILLA, CA 93610

Dated: May 26, 2009


Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk